STATE OF MICHIGAN

IN THE SUPREME COURT

The People of the State of Michigan Plaintiff/Appellee	Docket No. 151076 COA No. 325582 Circuit Court No. 14-009613-01-FH

v,

Kameron Leo Kilgo
Defendant/Appellant

_____/

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APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER PEOPLE V. CASH IS STILL VIABLE?**

II. **WHETHER THE DENIAL OF THE DEFENSE OF REASONABLE MISTAKE OF AGE OR FACT VIOLATES DUE PROCESS UNDER ARTICLE 1 § 17 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR EQUAL PROTECTION UNDER ARTICLE 1 § 2 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION?**

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INTRODUCTION

The Court has requested the parties to submit supplemental briefs, on or before July 8, 2015, not the final detailed briefs required, if Leave is granted. The issues to be briefed are the same issues posed by Appellant in its Application and Reply Brief. The only difference is the consolidation of the last two issues: due process and equal protection. The parties are not to repeat the argument initially made to this Court, per the Court's Order.

In the past 5 weeks, the United States Supreme Court decided Elonis v. United States, 575 US ____ (2015). Elonis, as will be discussed in the argument hereinafter, directly addresses certain aspects of the holding of this Court in People v. Cash, 419 Mich 230; 351 NW 2d 822 (1984).

Elonis, together with a series of United States Supreme Court decisions beginning in 1994, clearly spells out that, contrary to Cash, *mens rea* or scienter is necessary for every element of a criminal offense. The Supreme Court, in Elonis, citing 1 W. LaFave, Substantive Criminal Law, § 5.1, pp 332-333 (2nd Ed 2003) and Morissette v. U.S. 342 U.S. 246, 252 (1952), stated: "The 'central thought' is that a defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms, such as *mens rea,* scienter, malice aforethought, guilty knowledge and the like." The Court further stated:

> When interpreting ... criminal statutes that are silent on the required mental state, we read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct." Carter v. United States, 530 U.S. 255, 269 (2000) (quoting [U.S. v.] X-Citement Video, 513 U.S. 64, 72, [(1994)]. In some cases, a general requirement that a defendant act knowingly is itself an adequate safeguard.

In Cash, this Court stated:

> Petitioner's claims that his honest belief that the prosecutrix of the statutory rape charge was over 16 years of age should constitute a

> defense, of constitutional dimensions, to statutory rape. The effect of *mens rea* and mistake on state criminal law has generally been left to the discretion of the states. 419 at 245.

Elonis and its predecessors, starting in 1994, have held that the effect of *mens rea* is a constitutional defense. Further, as discussed more fully hereinafter, the Court, in Cash, was in error when it believed it could soften the effects of denial of *mens rea*, by writing that the trial court would be permitted to consider ameliorating evidence of defendant's mistaken belief as to complainant's age at time of sentencing. With the adoption of the Sexual Offenders Registration Act, MCL 28.721, et seq, the effect of not considering the absence of a defendant's "blameworthy mind" will not soften the lifetime ramifications of the sexual registry.

The People have argued to this Court that there has been no trial and therefore the Court should deny leave. Defendant has asked the Wayne County Circuit Court to be allowed to argue the defense of "mistake of age or fact" at trial. The trial court, Judge Timothy Kenny, Presiding Judge, denied the motion, but stayed same so that an appeal may be taken challenging this Court's decision in Cash. The Application is not premature and is properly before this Court.

As discussed more fully hereinafter, the People argue, in their brief in opposition to Appellant's Application for Leave, that the issues before the Court are legislative, not judicial. The People are incorrect. MCL 750.520d(1)(a) does not mention the words "actual" or "apparent." The standard of "actual age" was judicially created and must be judicially corrected.

ARGUMENT AND LAW

I. WHETHER PEOPLE V. CASH IS STILL VIABLE?

PEOPLE ANSWER YES

APPELLANT ANSWERS NO

STANDARD OF REVIEW

Matters of statutory construction are questions of law which this Court reviews de novo. People v. Williams, 491 Mich 164, 169; 814 NW 2d 270 (2012). Determining the elements of a crime is also question of law that the Court reviews de novo. People v. Holtschlag, 471 Mich 1, 4-5; 684 NW 2d 730 (2004). The Court reviews constitutional issues de novo. People v. McGee, 258 Mich App 683, 699; 672 NW 2d 191 (2003).

ARGUMENT

Cash is no longer viable, if it ever was viable. When Cash was decided, this Court did not consider MCL 28.721, et seq, the Sexual Offenders Registry Act because it had not been adopted at that time nor did the Court consider the changes in attitude that were developing regarding the defense of mistake of age or fact in statutory rape cases. As discussed more fully in the argument regarding violations of the 14th Amendment, due process and equal protection, This Court's decision in Cash is violative of the 14th Amendment..

II. WHETHER THE DENIAL OF THE DEFENSE OF REASONABLE MISTAKE OF AGE OR FACT VIOLATES DUE PROCESS UNDER ARTICLE 1 § 17 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND/OR EQUAL PROTECTION UNDER ARTICLE 1 § 2 OF THE MICHIGAN CONSTITUTION OF 1963 AND THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION?

PEOPLE ANSWER NO

APPELLANT ANSWERS YES

STANDARD OF REVIEW

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ARGUMENT

In Cash, this Court wrote:

> First a general rule of statutory construction is that the Legislature is "presumed to know of and legislate in harmony with existing laws." People v. Harrison, 194 Mich 363, 369; 160 NW 623 (1916). The Legislature must have been aware of our earlier decision rejecting the reasonable-mistake-of-age defense under the old statutory rape statute. Had the Legislature desired to revise the existing law by allowing for a reasonable-mistake-of-age defense, it could have done so, but it did not do so. [fn 7] This is further supported by the fact that under another provision of the same section of the statute, concerning the mentally ill or physically helpless rape victim, the Legislature specifically provided for the defense of a reasonable mistake of fact by adding the language that the actor "knows or has reason to know" of the victim's condition where the prior statute contained no requirement of intent. [fn 8]. The Legislature's failure to include similar language under the section of the statute in question indicates to us the Legislature's intent to adhere to the [People v.] Gengels [218 Mich 632; 188 NW 398 (1922)] rule that the actual, and not the apparent, age of the complainant governs in statutory rape offenses.

In Elonis, the Supreme Court of the United States wrote:

> The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." Morrissette v. United States, 342 U.S. 246, 250 (1952).. This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." Id at 252. As Justice Jackson explained, this principle is "as universal and persistent in nature systems of law as belief in freedom of the human will and a

> consequent ability and duty of the normal individual to choose between good and evil." Id at 250.

As discussed more fully hereinafter, this Court, in Cash, has effectively said that regardless of the circumstances, the "actual, not apparent age of the complainant governs in statutory rape offenses." Neither MCL 750.520d(1)(a); MSA 28.788(4)(1)(a) nor this Court's decision in Cash state how a person 16 or older can ascertain with assurance or have knowledge of the actual age of the minor under the age of 16, but over 13 when the minor seeks to deceive, including on occasion, the use of false identification. This aspect of Cash and MCL 750.520d(1)(a) are clearly vague.

The minor, under 16, may, as in this case, wear the accruements of being over 16 so as to deceive or appear on websites limited to adults or some have false identification by which they enter establishments that sell liquor intending to mislead and the victim of the deception, the older person, is criminally charged. The victim of the fraud faces a 15-year felony plus the requirement to be listed on the Sexual Offenders Registry, which includes reporting, restrictions in residency and conduct for 25 years to life. The deceiving minor is left to deceive again.

On its face, Cash and the statute, MCL 750.520d(1)(a) produce an absurd result and apply a nearly impossible standard. The failure to allow a defendant to plead the defense of "mistake of age or fact" results, as discussed hereinafter, in a fundamental denial of substantive due process and is basically unfair and a denial of equal protection under the 14th Amendment of the United States Constitution.

Further, with the adoption of SORA, MCL 28.722 et seq, the effects of denial of the defense of "mistake of age or fact" are amplified. Cash never considered MCL 28.722 because it did not exist when Cash was decided

MCL 750.520d(1)(a) says nothing about actual or apparent age, as controlling. The standard of "actual age" is court created. MCL 750.520d(1)(a) states:

> (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
> (a) That other person is at least 13 years of age and under 16 years of age.

This standard was the product of People v. Gengels, 218 Mich 632; 188 NW 398 (1922). The court in People v. Doyle, 16 Mich App 242, 243; 16 NW 2d 907 (1969) put this Court on notice by mentioning that Gengels may not be good law because of societal changes. This Court, in Cash, in 1984, intentionally ignored the cautions of Doyle.

If "apparent age" was used as the standard, "mistake of age or fact" would be mandated because Defendant's reasonable beliefs would control. Absent apparent age, MCL 750.520d(1)(a) is unconstitutionally vague.

On March 31, 2015, in John Does # 1-5 and Mary Doe v. Richard Snyder and Kriste Etue, Case No 12-11194, the Honorable Robert H. Cleland, United States District Judge, found, among his various findings, that MCL 28.734(1)(b) and MCL 28.735(1) to be unconstitutional vague[1].

Under MCL 28.733(e):

> (e) "School property" means building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:
> (i) It is used to impart educational instruction.
> (ii) It is for use by students not more than 19 years of age for sports or other recreational activities.
> (f) "Student safety zone" means the area that lies 1,000 feet or less from school property.

[1] See in accord, In Re Taylor, 60 Cal 4th 1019 (2015)

MCL 28.735 states that an individual required to be registered under SORA "shall not reside within a student safety zone, which as defined above, is 1,000 feet or less.

Judge Cleland found that nowhere in the statute does the statute define where or how one would measure the 1,000 feet and further, does not adequately define "school property." Accordingly, Judge Cleland found MCL 28.735, as it pertains to residency within 1,000 feet of a "school safety zone" to be unconstitutional and void for vagueness. Similarly, MCL 750.520d(1)(a) does not define how one is to ascertain the age of the minor until after the sexual contact has occurred.

The person over 16, at a time of arrousal, cannot rely on a driver's license, it may be false. That person cannot rely on a birth certificate, it may be forged. The person over 16 cannot rely on family members or friends of the minor to attest to his or her age. They may lie. The statute does not define how one is to ascertain the age of a person he or she seeks to date. Like MCL 28.735, coupled with MCL 28.733(f), MCL 750.520d(1)(a) is void for vagueness. The former statute does not state how one measures the 1,000 feet and the latter does not state how a person is to determine the actual age of the person that he or she seeks to date. A criminal statute must clearly state the prohibited conduct so that a defendant may conform his conduct to the statute. MCL 750.520d(1)(a) does not state how one is to ascertain the "actual age" of the person he or she is dating so as to conform his or her conduct.

Under Cash, a person over 16 could be raped by a person under 16, but older than 13, and be convicted of statutory rape. Under Cash, there are only two elements: (1) was there sexual penetration, and (2) was one of the parties to that sexual encounter actually under 16. No "conscious" wrongdoing is required. In fact, a jury trial may not be required and if required, the trial court must instruct the jury that it must find the defendant guilty if it finds a violation and an

actual age of under 16. Under strict liability, a conviction is certain regardless of the circumstances. The absence of the requirement of conscious wrongdoing or *mens rea* violates the very essence of due process.

In John Doe 1-5, et seq, Judge Cleland wrote:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The Supreme Court's vagueness doctrine has two primary goals. (1) "to ensure fair notice to the citizenry" and (2) "to provide standards for enforcement by the police, judges, and juries." Columbia Natural Res. Inc. v. Tatum, 58 F. 3d 1101, 1104 (6th Cir. 1995). In light of these goals, courts have developed a two-part test to determine if a statute is unconstitutionally vague. First, the court must determine whether the law gives a person "of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108. In reviewing a vagueness challenge, the court considers whether "ordinary people, exercising ordinary common sense, can understand [a statutory prohibition] and avoid conduct which is prohibited without encouragement of arbitrary and discriminatory enforcement. United States v. Salisbury, 983 F 2d 1369, 1378 (6th Cir 1993). Second, the court must evaluate whether the statute provides sufficiently "explicit standards for those who apply them" or whether due to a statute's vagueness, it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." Grayned, 408 U.S. at 108-09. "The standards of enforcement must be precise enough to avoid involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result." Columbia Natural Res. 58 F 3d at 1105 (quoting Cline v. Frink Dairy Co. 274 U.S. 445, 465 (1927)).
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> On the other hand, the rule of lenity reduces the risk of unfair notice and unclear enforcement standards. "[A]s a sort of 'junior version of the vagueness doctrine,' the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." United States v. Lanier, 520 U.S. 259, 266 (1997).

Without stating how the person over 16 is to determine the actual age of his or her sexual partner, the court attempts, without direction, to regulate a basic human need.

In Maslow's Hierarchy of Needs,[2] originally published in Maslow's Theory of Human Motivation, Psychological Review, 370-96, 1943, Maslow stated that there was a 5-stage model of needs and the first stage was biological and psychological needs, which included air, food, drink, shelter, warmth, sex and sleep. Although the current model is now 7 stages of needs, the first stage remains the same.

In 1969, in Doyle, the Court of Appeals noted that the sexual mores of the nation and in particular, Michigan, had changed since 1922. In 2015, the social mores are quite different than they were in 1922 or 1984. In 1995, 20% of teenagers 15 and under had had sexual relations.[3] In 2015, 50% or more of children are born to single mothers. This would have been unimaginable in 1922 and frowned upon in 1984.

Appellant does not argue that the state has no interest in protecting minors from wrongful sexual conduct, but as stated in Appellant's Application, a majority of states and the federal government either allow a defense of "mistake of age or mistake of fact"[4] or place the age of consent at 13 or younger.[5]

When Cash was decided, only California allowed the defense of mistake of age or fact. People v. Hernandez, 393 P. 2d 673 (1964). In 1984, the same year that Cash was decided, California reaffirmed its position that would permit the defense of mistake of age in People v. Olsen, 685 P. 2d 82 (1984). Alaska joined California in 1996 in State v. Fremgen, 914 P. 2d 1244 (1996). At the turn of the century, and particularly in the last 8 or 9 years, nearly 18 other states have permitted the defense of reasonable mistake of age or fact.

[2] Mc Leod, Essay (2014). Maslow's Hierarchy of Needs published in Simply Psychology.

[3] Guttenmacher Institute, American Teenage Sexual and Reproductive Health 2013.

[4] As stated in Appellant's Application, nearly, 20 states have, by statute or judicial decision, allowed a defense of "mistake of age or fact." 20 states out of 50 states equals 40%.

[5] While not entitled "statutory rape", 18 USC § 920/Art 120b, Rape and Sexual Assault of a Child places the age of consent at 12 years.

While many of the states have permitted the defense of mistake of age or fact by legislation, this does not render Cash and MCL 750.520d(1)(a) constitutional. It merely establishes that there is a trend among the states to permit this defense to avoid an absurd result.

In X-Citement Video, Inc., supra, at fn 2, page 72, the Supreme Court, in trying to resolve whether a showing of a pornographic movie starring Tracy Lords, who at the time of making the film was underage, stated that a visual depiction of an individual increases the opportunity for mistakes. Since 1984 or 1994, the opportunity for mistake in confronting the underage person personally has substantially increased. With plastic surgery, increased hormone ingestion and other physical factors, plus the change in social mores, the opportunity to mistakenly engage in sexual conduct with a minor under the age of 16 has increased. As stated above, neither the statute nor this Court has given members of the public direction how a given individual is to determine the actual age of the minor.

As stated, the statute, MCL 750.520d(1)(a), does not mention "apparent" or "actual" age. Instead, the statute leaves the person over 16 to guess at the actual age of the male or female with whom he or she is sexually involved. This creates a special class, separate and distinct from any other class.

If we deny that teenagers are involved in sex, we deny reality. It may not be favored, but it certainly is real. For decades, homosexuality was denied. It, too, may have not been favored, particularly in 1984, but it was a reality. This Court, in Cash, knew the reality, but wrote that the sentence could be ameliorated by the court upon conviction. Today, the conviction results in the defendant being placed on the Sexual Offenders Registry, pursuant to MCL 28.721, et seq, with its numerous and onerous restrictions. There is no amelioration of a 25 year to life restriction on where one can live, with whom one can associate or work.

In People v. Tombs, 472 Mich 446; 697 NW 2d 494 (2005), this Court stated that criminal offenses that do not require criminal intent are disfavored. The Court said, "The Court will infer the presence of the element unless a statute contains an expressed or implied indication that the legislative body wanted to dispense with it. Moreover, the Court has expressly held that the presumption in favor of criminal intent or *mens rea* requirement applies to each element of a statutory crime." Id at 454-455. There is no expression in MCL 750.520d(1)(a) that the legislature intended to dispense with expressed or implied intent. The "actual" age standard was judicially adopted.

The adoption of this standard singled out a particular class of individuals for different treatment. With no expressed legislative direction, this Court, contrary to its own holdings in Tombs, supra, has eliminated intent and adopted strict liability. This is a denial of equal protection.

In Lawrence v. Texas, 539 U.S. 558 (2003), as discussed in Appellant's Reply Brief, Justice O'Connor found that singling out homosexuals for prosecution under Texas sodomy laws constituted a violation of equal protection, so does the singling out of people who have been deceived or misled by the actions of a minor. To be denied a reasonable defense, to wit: reasonable mistake of age or fact, denies the deceived of equal protection.

CONCLUSION

MCL 750.520d(1)(a) merely holds that sex [penetration] with a person under the age of 16 if a felony punishable by 15 years incarceration. The statute says nothing about how one is to determine the age of a person purporting to be over the age of 16 before a person over 16 has violated the law. The statute says nothing about a defense of reasonable mistake of age or fact

and the statute says nothing about "apparent" or "actual" age. The statute does not prohibit *mens rea* and does not express itself as it regards intent. Again, we have an issue judicially created.

In the last approximately 30 years, a trend among the states has started to afford defendants the opportunity to raise the defense of "mistake of age or fact."

For the reasons discussed in the argument above, Leave to Appeal must be granted.

Dated:_____

Respectfully Submitted,

_____
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